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No. 15-723

In the Supreme Court of the United States

JEFFREY WOODS, PETITIONER

v.

TIMOTHY ETHERTON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Etherton's brief in opposition fails, just as the opinion below did, to identify any decision of this Court that could justify habeas relief. That failure confirms that summary reversal is warranted. And his other arguments serve only to further highlight the Sixth Circuit's errors.

First, Etherton's effort to show that the anonymous tip at issue in this case was testimonial hearsay actually demonstrates the opposite. The cases on which Etherton relies, especially *United States* v. *Cromer*, 389 F.3d 662 (6th Cir. 2004), demonstrate the panel majority's error, as those cases *agree* that admitting testimony for purposes other than its truth does not violate the Confrontation Clause.

Second, Etherton repeatedly fails to describe the content of the anonymous tip accurately. This is an error that runs through the brief in opposition, and changes the entire tenor of the case. Examining the actual contents of the tip demonstrates not only that the tip was not testimonial hearsay, but also that its admission, if it had been error, was harmless.

Third, Etherton repeatedly misunderstands the State's position and so fights back against a straw man of his own construction. The State's actual position is in line with this Court's precedent.

In addition to these, the brief in opposition makes numerous other errors, several of which deserve correction. And in the end, none of his arguments undermine the need for this Court to reinforce the relevant standards by reversing the Sixth Circuit.

ARGUMENT

I. The circuit precedent Etherton cites strongly supports the State's argument.

In his effort to support his claim that the anonymous tip here was testimonial hearsay, Etherton presents several decisions from the Sixth Circuit and one from the Seventh Circuit. The fact that Etherton relies on circuit precedent demonstrates the weakness of his habeas petition. If *Crawford*, or any other decision of *this* Court, clearly established that the testimony in this case was testimonial hearsay, then Etherton's best course would be to cite that decision, since 28 U.S.C. § 2254(d)(1) expressly limits "clearly established Federal law" to the decisions of "the Supreme Court of the United States." He does not because he cannot.

But his cases, especially *Cromer*, deserve a look. In *Cromer*, the Sixth Circuit considered three sets of out-of-court statements that were admitted at trial through the testimony of a police officer. 389 F.3d at 672. First was the officer's testimony that she had received a tip about a particular address being associated with drugs. *Id.* at 672, 675. Second was testimony that the officer had a tip that a man nicknamed "Nut" was involved with drug activity. *Id.* at 672, 676. (The prosecution established that Cromer's nickname was "Nut." *Id.* at 676.) Third was a physical description the informant had given to the officer—a description that matched Cromer. *Id.* at 672, 678.

Etherton claims, "The Sixth Circuit found this testimony to violate the constitutional right of confronta-

tion, and reversed even though there was no objection." Br. in Opp. 13. Close, but no. While the *Cromer* court held that admission of the second and third sets of testimony violated the Confrontation Clause, it also held that the first set of testimony did not. 389 F.3d at 676. The court held in part that, "[e]ven if testimonial statements of an out-of-court declarant were revealed by this testimony, Cromer's confrontation right was *not implicated* because the testimony was provided merely by way of background." *Id.* (emphasis added); accord Pet. 17–19. The court continued (using language the majority below *should* have employed in the instant case), "Any out-of-court statements alluded to at this juncture served the purpose of explaining how certain events came to pass or why the officers took the actions they did." *Cromer*, 389 F.3d at 676. The testimony about "Nut," however, was found to be inadmissible because it actually implicated Cromer himself in illegal activities. *Id.* at 677–79.

The tip at issue in this case is akin to the first set of testimony in *Cromer*. It did not identify Etherton by name. It did not give a description except to say that the car would contain two white men—a very general description. Pet. App. 28a ("The content of the tip that was introduced described: (1) two white men; (2) in a White Audi; (3) driving from Grand Rapids to Detroit and back to Grand Rapids on I-96; and (4) possibly with cocaine in the vehicle."). It did not say, for example, that the driver of the car possessed the cocaine, or that both occupants possessed it jointly. Contra Br. in Opp. 20 (asserting that "[t]he tip assigns responsibility to both occupants of the car"). It did not even say that *either* occupant possessed the cocaine. And most relevant, it was never admitted at trial for any reason

other than to provide background—to give the jury an understanding why the police stopped this car in particular. So, to the extent *Cromer* is persuasive, it shows that Etherton's rights were not violated.

But *Cromer* is even more persuasive in *how* it reached the answer than what that answer was. The *Cromer* court did not simply cite *Crawford* and assert that the answer was established there. Nor did it cite any decisions of this Court other than *Crawford*. Rather, it began its analysis with *Crawford*, and then went on to find guidance elsewhere. It cited two law review articles and three cases from sister circuits, before finding itself persuaded by one of the law review articles and adopting that reasoning.

The Sixth Circuit was free to come up with its own answer in *Cromer*—a direct-review case—only because it was not bound by AEDPA, and because *this Court had not clearly established the answer*. (Indeed, if it had, the court of appeals would have had no reason to cite circuit precedents and law-review articles.) But had the *Cromer* court been reviewing the question on habeas review from a state court, it would not have asked whether the tip was testimonial hearsay, but rather whether *this Court had held* that a tip under those circumstances was testimonial hearsay. The court below should have recognized, as the *Cromer* court did, that this Court has not squarely ruled on this question. But because the majority below should have been bound by AEDPA, the analysis should have ended there.

The other circuit-court cases Etherton cites do not help him either. *United States* v. *Powers*, 500 F.3d 500 (6th Cir. 2007), is, like *Cromer*, a direct-appeal case,

not governed by AEDPA's strict standard. *Powers*, like *Cromer*, did not find its answer in any decision of this Court. Instead, it followed *Cromer* (including the holding that "testimony 'provided merely by way of background,' or to explain simply why the Government commenced an investigation, is not offered for the truth of the matter asserted and, therefore, does not violate a defendant's Sixth Amendment rights." 500 F.3d at 508 (quoting *Cromer*, 389 F.3d at 676).

Miller v. *Stovall*, 608 F.3d 913 (6th Cir. 2010), resulted in a split decision holding that a suicide note directly incriminating the defendant was testimonial hearsay. Etherton misses two things about *Miller*: first, this Court *vacated* the opinion in light of *Greene* v. *Fisher*, 132 S. Ct. 38 (2011). *Stovall* v. *Miller*, 132 S. Ct. 573 (2011). And second, although Etherton is correct in noting that *Miller* was a habeas case, what he overlooks is that the *Miller* majority did not believe itself bound by AEDPA, and explicitly resolved the question under de novo review. 608 F.3d at 926. Further, the hearsay statement in *Miller* accused the defendant directly, unlike the tip at issue here.

Finally, Etherton cites *United States* v. *Silva*, 380 F.3d 1018 (7th Cir. 2004), another direct-appeal case not decided under AEDPA. The *Silva* court recognized that "[t]here are no doubt times when the testimony regarding a tip from an informant is relevant. If a jury would not otherwise understand why an investigation targeted a particular defendant, the testimony could dispel an accusation that the officers were officious intermeddlers staking out [the defendant] for nefarious purposes." *Id.* at 1020. That was not true of the tip in

Silva (which is why the Seventh Circuit reversed the conviction), but it is true here.

In sum, the precedent Etherton cites to support his claim is circuit precedent (and therefore not clearly established federal law under § 2254) that was applying de novo review (not AEDPA's standards) and that was itself based on circuit precedent—and even those cases do not support his claim, because none of the cases reversed a conviction based on a tip that did not accuse the defendant. His lead case, *Cromer*, squarely held that a tip admitted to show why police investigated as they did was admissible non-hearsay, and two others, *Powers* and *Silva*, recognized this principle as valid.

II. The anonymous tip in this case did not accuse Etherton.

Etherton's brief in opposition repeatedly describes the tip that was admitted in this case as "involv[ing] [Etherton] in the crime," Br. in Opp. 3, and as "blaming both men in the Audi for the cocaine," *id.* at 10. See also *id.* at 17, 20, 24, 25, 27 In truth, however, the tip did not accuse Etherton, did not accuse the driver, did not accuse both men, did not accuse anyone. App. 28a ("The content of the tip that was introduced described: (1) two white men; (2) in a White Audi; (3) driving from Grand Rapids to Detroit and back to Grand Rapids on I-96; and (4) possibly with cocaine in the vehicle.").

As the majority below noted, there were three references to the tip in trial testimony. First, Trooper Antcliff testified that the tip referred to "a white Audi with two [white] males traveling from Grand Rapids

to Detroit back to Grand Rapids, possibly carrying cocaine in the vehicle. " App. 9a. This does not blame both men, or either man, for the cocaine; it only describes who is in the car and says that cocaine might be in the car.

The second reference to the tip did not disclose any of the tip's contents. App. 9a. The third reference to the tip did not mention cocaine. App. 10a.

Etherton candidly allows that "[i]n the abstract, it is certainly possibly that only one of the men in the car knew of and knowingly possessed the drugs, and even possible, under some circumstances, that neither of the men would know." Br. in Opp. 20–21. Exactly correct: the content of the tip is equally consistent with the cocaine belonging to Etherton, to Pollie, to both, or to neither.

But, Etherton continues, "[o]bviously" the tip "would be reasonably likely to cause jurors to believe that the two men in the car were guilty." Br. in Opp. 21. Why? Apparently, Etherton believes that when cocaine is found in a car, it is likely that a reasonable juror will attribute its possession jointly to all of the car's occupants. Even accepting that premise, it was uncontested in this case that cocaine was found in the car Etherton was driving. Any juror inclined to attribute cocaine possession to both occupants would blame Etherton based on the undisputed fact that he was one of the car's occupants, not based on the tip.

III. The State does not argue that habeas relief is never merited.

Etherton repeatedly misunderstands the State's position in this case. Br. in Opp. 1, 4, 9, 19, 30–31. The State does not assert, as he contends, that habeas relief may never be granted—that "nothing the state does can ever be overturned." *Id.* at 19. The State agrees with this Court that, while habeas relief from state-court judgments should *almost* never be granted, AEDPA "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Harrington* v. *Richter*, 562 U.S. 86, 102 (2011). Habeas relief may be granted "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Id.*

This is not a case for such extraordinary relief. Etherton paints the State's position as requiring the federal courts to rubber-stamp state-court decisions. Of course not. All the State asks is that the Sixth Circuit obey what Congress has commanded: to consider "what arguments or theories supported, or could have supported, the state court's decision," and to deny habeas relief if any of those arguments are reasonable. *Id.* The panel majority's failure to do this is only one of several distinct reasons this Court should grant certiorari and reverse.

Etherton's claim that the panel majority applied appropriate deference is unsupported and unconvincing. Certainly, the majority dutifully recited the standard of review. App. 17a–19a. And the majority did, in the briefest and most conclusory fashion, say that the state-court decisions were unreasonable.

App. 32a–33a. Missing, however, is any explanation of *why* the state-court rulings were unreasonable (which is distinct from merely incorrect). Etherton asserts that "[t]here is page after page of explanation," Br. in Opp. 8, but he does not cite even one page of explanation, because there is nothing to cite. The majority's analysis is confined to why the state court was wrong, not why it was unreasonable.

IV. The brief in opposition contains other errors and statements that deserve correction.

Several other statements in Etherton's brief in opposition deserve short responses.

1. Etherton argues that state law made the contents of the tip inadmissible. Br. in Opp. 17–18, 22–23. This assertion is incorrect and irrelevant. *People* v. *Wilkins*, 288 N.W.2d 583 (Mich. 1980), on which Etherton chiefly relies, does not hold that admission of a tip to show why police investigated violates the Michigan's rule against hearsay. Rather, *Wilkins* held that the evidence at issue in that case was inadmissible under Michigan Rules of Evidence 401 (relevance) and 403 (substantially more prejudicial than probative). More recent cases establish that evidence of this sort does not violate Michigan's rules against hearsay. E.g., *People* v. *Chambers*, 742 N.W.2d 610, 616 (Mich. Ct. App. 2007). Regardless, a perceived violation of state law cannot form the basis of a grant of habeas relief. *Estelle* v. *McGuire*, 502 U.S. 62, 67–68 (1991).

2. Etherton also refutes the argument "that claims of plain error and harmless error were not addressed." Br. in Opp. 26. True enough, but the State never made

that argument. The State's claim is not that the majority completely ignored harmlessness and plain-error review, but that it did not take seriously the arguments that would have supported a finding of harmlessness or no plain error.

3. Etherton complains that "the trial court simply applied a presumption that anything done or not done by appellate counsel was an intentional, competent decision that was part of sound strategy." Br. in Opp. at 30. Etherton calls this "clear error." *Id.* He is wrong. This Court has held that, in deciding ineffective-assistance claims, "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984). In applying a presumption of competence and sound strategy, the trial court did exactly as this Court has held proper.

4. Etherton assigns to the state trial court the view that "there is no such thing as ineffective assistance of appellate counsel if the attorney files anything." Br. in Opp. 30–31. Nothing in the trial court's opinion supports this attack. The trial court explained in detail why Etherton had failed to overcome the presumption that the decision not to raise the confrontation claim was sound appellate strategy. App. 88a–89a. The opinion shows that the trial court denied relief not because it is impossible to show ineffective assistance of appellate counsel under any circumstances, but because Etherton had failed to show ineffective assistance of appellate counsel in this case.

5. Etherton assures this Court that the habeas grant here is only that of a new appeal, and that it

"does not automatically set him free." Br. in Opp. 33. This is an odd assertion, since Etherton takes the position that he would "unquestionably" prevail on appeal with this claim, *id.* at 32, and that the prosecution would have to proceed on retrial without "the **most important** evidence in the case," *id.* at 24. No matter. Regardless whether the grant affords Etherton a new appeal, new trial, release, or other remedy, the erroneous decision below is an affront to the important principles of comity, federalism, and finality of state-court judgments that AEDPA was enacted to protect.

CONCLUSION

The petition for writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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